Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

SHERIFF RICHARD MACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress exceeds its Commerce Clause powers when it orders State officials, themselves neither engaged in nor interfering with interstate commerce, to exercise their police powers with regard to commerce.

2. Whether a Federal statute requiring State officials to investigate and pass upon the background of each handgun purchaser can be reconciled with the Tenth Amendment as construed in *New York v. United States*, 505 U.S. 144 (1992), on the claimed distinction that it commandeers a State's labor rather than its policymaking.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Sheriff Richard Mack and the United States of America. Neither has parent companies or wholly or nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

Questions Presented i

Parties To The Proceeding ii

Table Of Contents iii

Authorities Cited iv

Opinions Below 1

Jurisdiction 1

Statutes And Constitutional Provisions Involved 2

Statement Of The Case 3

Reasons For Granting The Writ 8

I. The Ninth Circuit's Decision Broadens The Commerce Power In A Manner Which Conflicts With The Rulings Of This Court And Of Other Circuits 8

II. The Decision Of The Ninth Circuit Improperly Narrows The Scope Of The Tenth Amendment As Recognized In *New York v. United States* .. 12

Conclusion 19

AUTHORITIES CITED

Page

CASES

Board of Natural Resources v. Brown, 992 F.2d 937 (9th Cir. 1993) 15, 16, 17, 19

Bowsher v. Synar, 478 U.S. 714 (1986) 18

Brown v. EPA, 521 F.2d 827 (9th Cir. 1975), *remanded for consideration of mootness*, 431 U.S. 99 (1977), *opinion on remand*, 566 F.2d 665 (9th Cir. 1977) 9, 11

Buckley v. Valeo, 424 U.S. 1 (1976) 18

District of Columbia v. Train, 521 F.2d 971 (D.C. Cir. 1975), *remanded for consideration of mootness sub nom., EPA v. Brown*, 431 U.S. 99 (1977) 9, 11

FERC v. Mississippi, 456 U.S. 742 (1982) 13

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) 10, 13

Hodel v. Virginia Surface Mining & Reclam. Ass'n, Inc., 452 U.S. 264 (1981) 13

Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994), *rev'd*, 66 F.3d 1025 (9th Cir. 1995) 1

New York v. United States, 505 U.S. 144 (1992) ... *passim*

Puerto Rico v. Branstad, 483 U.S. 219 (1987) 10

South Carolina v. Baker, 485 U.S. 505 (1988) 10

State of Maryland v. EPA, 530 F.2d 215 (4th Cir. 1975), *remanded for consideration of mootness sub nom. EPA v. Brown*, 431 U.S. 99 (1977) 9, 11

Testa v. Katt, 330 U.S. 386 (1947) 13

AUTHORITIES CITED – Continued

Page

United States v. Lopez, 115 S.Ct. 1624 (1995) 11

Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3501 (1996) 10

Constitutional Provisions

U.S. Const., Art. I §8 ..... 2, 9, 18

U.S. Const., Art. I §9 18

U.S. Const., Art. II, §2 18

U.S. Const., Art. II, §3 18

U.S. Const., Art. IV §4 18

U.S. Const., Amend. 10 ..... *passim*

Statutes and Rules

16 U.S.C. §§620-620j 15

18 U.S.C. §921(a)(20) 4

18 U.S.C. §922(g) 4

18 U.S.C. §922(n) 4

18 U.S.C. §922(s) ..... *passim*

18 U.S.C. §923(g) 4

18 U.S.C. §924 3

18 U.S.C. §925A 2, 3, 5

28 U.S.C. §1254(1) 1

28 U.S.C. §1331 6

AUTHORITIES CITED – Continued

Page

REGULATIONS

27 C.F.R. §§178.124, 178.161 4

Attorney General Order No. 1853-94, 59 Federal Register 9498 (Feb. 28, 1994) 6

TREATISES AND ARTICLES

B. Bailyn, The Ideological Origins of the American Revolution 198-229 (1967) 18

D. Merritt, *The Guarantee Clause and State Autonomy*, 88 Col. L. Rev. 1 (1988) 13

D. Merritt, *Three Faces of Federalism*, 47 Vand. L. Rev. 1563 (1994) 17

Federalist No. 28 (A. Hamilton) 18

Federalist No. 45 (J. Madison) 8

Federalist No. 51 (J. Madison) 19

Petitioner Sheriff Richard Mack requests that a writ of certiorari issue to review the final order of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as *Mack v. United States*, 66 F.3d 1025 (9th Cir. 1995) and is reproduced in the Appendix ("App.") at 1. The order of the Court of Appeals denying Petitioner's petition for rehearing is unpublished, and is reproduced at App. 24. The opinion of the United States District Court is reported as *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994) and is reproduced at App. 26.

JURISDICTION

On September 8, 1995, the Court of Appeals reversed in part, affirmed in part, and dismissed in part the judgment of the District Court, thereby upholding the validity of the statutory provisions in question. On December 19, 1995, the Court of Appeals denied Petitioner's petition for rehearing and suggestion for rehearing *en banc*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, §8 of the Constitution of the United States provides:

> Congress shall have the power . . . to regulate Commerce with foreign Nations, and among the several States. . . .

Amendment 10 to the Constitution of the United States provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Pub. L. 103-159, 107 Stat. 1536 (1993), codified as 18 U.S.C. §§922(s), 924, 925A, is reproduced in full at App. 51. As codified, it provides in relevant part:

18 U.S.C. §922(s):

> (1) . . . . it shall be unlawful for any . . . licensed dealer to sell, deliver, or transfer a handgun . . . unless. . . .
>
> (A)(i) the transferor has –
>
> (I) received from the transferee a statement of the transferee containing the information described in paragraph (3);. . . .
>
> . . . .
>
> (III) within 1 day . . . provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee. . . .

(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

18 U.S.C. §924(5):

Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1,000, imprisoned for not more than 1 year, or both."

18 U.S.C. §925A:

Any person denied a firearm pursuant to subsection (s) or (t) of section 922 –

. . . .

(2) who was not prohibited from receipt of a firearm . . . may bring an action against the State or political subdivision responsible for . . . denying the transfer . . . for an order directing that . . . the transfer be approved. . . . In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Federal law has long prohibited the receipt of firearms by certain classes of persons. These are defined with varying degrees of clarity and complexity, but generally

include those convicted of certain offenses[1] and who have not received pardon, restoration of civil rights, or Federal relief from disabilities, undocumented aliens, users of illicit drugs, those who have been the subject of certain mental adjudications, those given dishonorable military discharges, persons who have renounced American citizenship, and those subject to certain domestic restraining orders. 18 U.S.C. §922(g), (n). Persons purchasing from a Federally-licensed firearms dealer are required to attest that they fall within none of these categories; the attestation is available for inspection by Federal agents, who may bring Federal charges as appropriate. 18 U.S.C. §923(g)(1)(A),(B); 27 C.F.R. §§178.124, 178.161.

With the expressed intent of increasing the effectiveness of these restrictions, Congress enacted Pub. L. 103-159, 107 Stat. 1536 (1993). That statute envisioned an eventual "permanent system" whereby each handgun purchaser would be checked against an automated Federal database of prohibited purchasers. Since no such Federal database exists,[2] the statute created an "interim system" under which duties would be placed upon State

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[1] In general, those convicted of an offense punishable by imprisonment of more than a year, excepting certain business offenses and offenses denominated misdemeanors and punishable by no more than two years' imprisonment. 18 U.S.C. §921(a)(20). "Open-ended" offenses are treated in accord with the law of the jurisdiction of conviction. *Id.*

[2] NCIC reflects outstanding warrants; State criminal records are of varying detail, often reflecting arrests but not convictions, let alone restorations of civil rights. Centralized records of the other categories – dishonorable discharges, mental adjudications, domestic restraining orders, etc. – simply do not exist.

officials for five years, or until the Federal system is funded and functional.

Under the interim system, every Federally-licensed firearms dealer is required to send a Federal form, giving notice of each handgun sale, to his "Chief Law Enforcement Official" (CLEO), a term defined to exclude Federal, and include State, law enforcement officials. 18 U.S.C. §922(s)(8). The CLEO is in turn required[3], within five business days, to make reasonable effort to determine whether each purchaser so reported is forbidden to receive firearms by any Federal, State, or local law. 18 U.S.C. §922(5)(2). (Paradoxically, the minimum effort required of the *State* official is the consultation of databases maintained by *Federal* offices. 18 U.S.C. §922(s)(2).).

If the CLEO finds no bar to the purchase, the statute commands him to destroy the form and any references to it within twenty business days. 18 U.S.C. §922(s)(6)(B). If he finds a bar, he must so inform the Federally-licensed dealer and, if the purchaser requests, provide a written justification of his findings. 18 U.S.C. §922(s)(6)(C). Should the CLEO err in barring a purchase, the statute creates a Federal cause of action against his jurisdiction for correction and recovery of attorneys' fees. 18 U.S.C. §925A.

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[3] Earlier bills had sought to provide opportunity for a State background check, rather than to mandate it. The proponents of the legislation in the 103d Congress, in contrast, stressed the mandatory nature of background checks as a virtue of their proposal. *See* H.R. Rep. No. 103-344, at 7 (1993); 139 Cong. Rec. H9091, H9094-95, H9107 (Daily ed., Nov. 10, 1993).

The 1993 statute thus shifts the primary burden of enforcing the Federal system onto State officials, requiring them to consult Federal records to determine whether each sale by a Federally-licensed dealer meets Federal standards. Pursuant to its requirements, the Attorney General of the United States issued Order No.1853-94, ordering State CLEOs to consult two Federal databases. 59 Federal Register 9498 (Feb. 28, 1994). State officials were thus required to check Federal forms, submitted by Federally-licensed dealers, against Federal databases and Federal law.

Petitioner Richard Mack is Sheriff and thus CLEO of Graham County, Arizona. As Sheriff, he is responsible for maintaining the peace of its 28,000 residents. App. 63. Even prior to enactment of the statute at issue, his force of twelve sworn officers was able to average but 1.5 officers on patrol at any given time, to cover a 4,500 square mile jurisdiction. *Id.*

Under the new Federal mandate, Petitioner was obliged to attempt to verify that each handgun sold by the county's 35 licensed dealers was in fact transferred to a lawful purchaser. The work consumed one to two man-hours of effort per day. App. 65. In the first three months, Petitioner processed over eighty purchase forms, of which exactly one proved questionable. *Id.* The mandated labor earned Petitioner the anger of his constituents, who held him accountable for diversion of his law enforcement resources. App. 66.

In February, 1993, Petitioner commenced an action in the United States District Court, District of Arizona, invoking its jurisdiction under 28 U.S.C. §1331. He sought

declaratory relief establishing, *inter alia*, that 18 U.S.C. §922(s) exceeds Congress' Article I powers and is inconsistent with the Tenth Amendment, and an injunction against its enforcement.

The District Court (Roll, J.), relying upon this Court's decision in *New York v. United States*, 505 U.S. 144 (1992), entered final judgment striking those parts of 18 U.S.C. §922(s) which purport to impose duties upon State officials and upheld the remainder of the statute as severable. App. 26.

A divided Court of Appeals reversed the judgment of the District Court striking portions of the statute. The majority disposed of the Commerce Clause issue with a brief note that the statute regulates commerce. App. 5. It dealt with the Tenth Amendment concern by concluding that *New York* does not bar mandates to State officials to enforce, as opposed to enact, Federal programs:

> The Brady Act is not the kind of a federal mandate condemned by *New York*, nor does it present the concerns related above. . . . It is true that, for a limited period of time, the Act requires state law enforcement officials, the CLEOs, to make reasonable efforts to assist in carrying out the federal program. But the CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations. . . . Instead, they are directed to serve for a temporary period as law enforcement functionaries in carrying out a federal program.

App. 12-13. In dissent, Judge Fernandez argued that the enact/enforce distinction was inconsistent with the teaching of *New York*. "This case makes palpable the notion that the states are just a part of the national government, a notion that was rejected when this country was founded." Judge Fernandez added that, if an enact/enforce distinction could be drawn, the latter would be the greater, not the lesser, infringement of federalism:

> Rather than ordering state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly. Under this new approach, the states have nothing to say about it. Their officials are ordered to become part of a federal gun control program at the state's own expense and are ordered to engage in various tasks necessary to administer that program.

App. 21.

REASONS FOR GRANTING THE WRIT

I

The Ninth Circuit's Decision Broadens The Commerce Power In A Manner Which Conflicts With The Rulings Of This Court And Of Other Circuits

The Framers believed that liberty was best preserved by dividing the responsibilities of power among jealous rivals – executive and legislative, State and Federal. To protect the role of the States, the Framers gave the national government powers that were "few and defined," *Federalist No. 45* (J. Madison), a limitation

underscored by the later ratification of the Tenth Amendment.

Among those defined powers was authority "to regulate commerce . . . among the several States." Art. I, §8. As the nation has grown, so has this power. But in 1993 Congress chose to regulate, not commerce, but the States themselves. It issued commands to their officials, not on the basis that they were engaging in or regulating commerce, but on the basis that they were declining to do so.

For two centuries, it has been the understanding of all – Congress, President, and courts – that the Commerce Clause does not authorize Congress to command the States to regulate commerce. Two decades have passed since the Courts of Appeals overwhelming rejected, and the United States declined to defend, attempts to command State enforcement of Federal regulation of commerce. That chain of cases began when the EPA "vetoed" certain State attempts at Clean Air Act compliance and imposed Federal standards. Rather than use Federal resources to enforce its standards, EPA asserted the statutory power to force State agencies to apply them.

The Fourth, Ninth, and District of Columbia Circuits held that such a construction would exceed the Commerce Clause and Tenth Amendment restrictions, and repudiated the asserted power. *See State of Maryland v. EPA*, 530 F.2d 215, 227-28 (4th Cir. 1975); *Brown v. EPA*, 521 F.2d 827, 837-39 (9th Cir. 1975); *District of Columbia v. Train*, 521 F.2d 971, 992 (D.C. Cir. 1975) ("We are aware of no decisions of the Supreme Court which hold that the federal government may validly exercise its commerce power by directing nonconsenting states to regulate

activities affecting interstate commerce, and we doubt that any exist.").[4]

After this Court granted certiorari, the Solicitor General declined to defend the regulations, *see* Brief for the Federal Parties, *EPA v. Brown* (No. 75-909) at 20 n.14, and this Court acted upon the concession. *EPA v. Brown*, 431 U.S. 99 (1977).

The issue, indefensible in 1977, now reappears. It is presented, paradoxically, in the wake of this Court's recent reiteration that:

> While the Framers no doubt endowed Congress with the power to regulate interstate commerce in order to avoid further instances of the interstate trade disputes that were common under the Articles of Confederation, the Framers did *not* intend that Congress should exercise that power through the mechanism of mandating State regulation. The Constitution established Congress as a 'superintending authority over the reciprocal trade' among the States, The Federalist No. 42, p. 268 (C. Rossiter, ed. 1961) by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to State governments.

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[4] It is noteworthy that all Federal commands to the States upheld to date involved either commercial activity by the State itself, *see, e.g., Garcia v. San Antonio Metropolitan Transit Auth.*, 469 F.2d 528 (1985) (payment of wages); *South Carolina v. Baker*, 485 U.S. 505 (1988) (issuance of bonds) or enumerated non-commerce powers. *See Puerto Rico v. Branstad*, 483 U.S. 219 (1987) (Extradition Clause); *cf. Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3501 (1996) (Elections Clause).

New York v. United States, 505 U.S. at 166; *see also United States v. Lopez*, 115 S.Ct. 1624, 1626 (1995) (invalidating statute which neither regulated commerce nor required a connection to commerce).

Petitioner's position was simple: while firearms may flow in interstate commerce, he is not a firearms dealer, but a State official exercising police powers given him by the people of Arizona. (Appellee's Brief, 16-17; Reply Brief, 3; App. 22, 43). He neither engages in nor interferes with interstate commerce when he declines to review firearm purchase forms. If anything, he is *refusing* to affect commerce, and Congress is attempting to *force* him to do so.

The Ninth Circuit here disposed of the Commerce Clause issue with the note that regulation of firearm sales lies within the commerce power, and the statute in question focuses on sale rather than simple possession. App. 5. The fact that *others* in a State engage in commerce is thus made dispositive of the Congressional power to command State officials.

This treatment places the Ninth Circuit in conflict with *New York* and *Lopez*, not to mention Circuit rulings in *State of Maryland*, *Brown*, and *Train*.[5] If it is good law, then

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[5] The Ninth Circuit attempts to distinguish *Brown* on the claim that the EPA there sought to compel State adoption of regulations. App. 15. In fact, the State regulations involved in these cases had been "vetoed," and Federal regulations imposed. The issue was posed even more clearly on remand, when the Administrator disavowed all intent of forcing State rulemaking, and the court specifically rejected the power to require State enforcement of Federal regulations. *Brown v. EPA*, 566 F.2d 665 (9th Cir. 1977).

New York cannot be: nuclear waste travels in and affects commerce, and Congress would have every right to command States to deal with it.

The Ninth Circuit decision, in sum, extends the Commerce Clause to the point where it abrogates the core principles of federalism itself. If the national sovereign can use the plenary power of the Commerce Clause to *force* State officials to control commerce as it sees fit, then indeed States are no more than regional offices of the national government – and unpaid ones at that.

II

The Decision Of The Ninth Circuit Improperly Narrows The Scope Of The Tenth Amendment As Recognized In *New York v. United States*.

The United States has repeatedly argued before this Court that mandated State enforcement of Federal policy would pose the quintessential Tenth Amendment violation:

> Under this Court's decision in *New York v. United States, supra*, very different constitutional issues would be presented if Congress imposed statutory requirements or prohibitions directly upon state and local educational officials, or if Congress mandated that state and local governments assume responsibility for the enforcement of federal law.

Reply Brief for the United States, *United States v. Lopez* (No. 93-1260) at 10.[6] By virtue of a reversal of Respondent's Tenth Amendment position, these "very different constitutional issues" are now squarely posed.

This Court has outlined in detail the parameters of Tenth Amendment federalism. While Congress can subject States to generally applicable regulations, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), or to special regulation *if* it offers valid alternatives, *FERC v. Mississippi*, 456 U.S. 742 (1982) (option of abstaining from regulating commerce); *Hodel v. Virginia Surface Mining & Reclam. Ass'n, Inc.*, 452 U.S. 264 (1981) (option of Federal pre-emption), or can (pursuant to the Supremacy Clause) require State adjudicators to apply Federal law, *Testa v. Katt*, 330 U.S. 386 (1947),[7] it *cannot* unconditionally commandeer State resources for its own ends. *New York v. United States*.

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[6] *See also* Brief of the United States, *New York v. United States*, at 37 (distinguishing statute from hypothetical measures requiring "implementation of federal policies regulating private conduct, which would transform State administrative bodies into 'field offices of the national bureaucracy.' ").

[7] *Testa* invalidated a State bar to enforcement of certain Federal claims in State courts of general jurisdiction. The rationale was simple: courts of general jurisdiction by definition rule upon all legal issues brought before them, and a constitutional Federal statute is entitled to supremacy. The filing of Federal claims in State court was the rule in the early republic; the State duty to hear them was recognized as early as *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). "No such historical tradition supports federal compulsion of a state's executive or legislative branches." D. Merritt, *The Guarantee Clause and State Autonomy*, 88 Col. L. Rev. 1, 66 n.369 (1988).

New York sets forth this Court's understanding of the Tenth Amendment. There, the Low-Level Radioactive Waste Policy Act gave States two alternatives: enter into specified interstate compacts (a legislative act) or take title to waste upon tender (a ministerial act at most). This Court concluded that *neither* alternative met Tenth Amendment muster.

The Court's rejection of the "take title" alternative is inconsistent with the Ninth Circuit's discovery that federalism protects only narrowly-defined legislative powers of the States:

> On one hand, the Constitution would not permit Congress simply to transfer radioactive waste from generators to state governments. Such a forced transfer, standing alone, would be in principle no different from a congressionally compelled subsidy from state governments to radioactive waste producers. The same is true of the provision requiring state governments to become liable for the generators' damages. Standing alone, this provision would be indistinguishable from an Act of Congress directing the states to assume the liabilities of certain state residents. Either type of federal action would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments.

505 U.S. at 175. The breadth of *New York's* holding was underscored by this Court's use of the disjunctive: "Whatever the outer limits of [State] sovereignty may be,

one thing is clear: the federal government may not compel the states to enact *or* administer a federal regulatory program." *Id.* at 188 (emphasis supplied).

This understanding is shared by *Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993). There the circuit considered the constitutionality of the Forest Resources Conservation Act, 16 U.S.C. §§620-620j. That statute essentially banned export of timber harvested on State lands, and required governors to issue implementing regulations. The panel held the disputed portion of the statute void under *New York*. To the government's contention that "Washington can avoid the Act altogether by simply halting all sales of timber," the circuit responded that this "is a choice similar to the one declared unconstitutional in *New York*, as it presents an alternative, halting all timber sales, that Congress has no authority to command." 992 F.2d at 947.[8]

The Ninth Circuit's decision here flies in the face of this precedent. It places a gloss on this *New York*'s use of "or administer," concluding that this Court must have meant only " 'administer' in the sense of being in charge of a program and making policy decisions. . . . " App. 11,

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[8] The government had contended: "The Counties' Tenth Amendment claim fails first because Washington can remove itself from the reach of Section 491 entirely by halting sales of timber from the State's public lands. . . . In fact, the alternative open to Washington here would appear to be far less onerous than the alternative that eliminated the question of commandeering in *FERC*." It went on to contend that the State could still derive value from the resource, simply by selling timber lands rather than harvesting the timber itself. Brief for the Appellees, at 42-43.

n.7. The interpolation is inconsistent with the holding of *New York*, which invalidated *both* compelled compacts *and* mandated acceptance of title, and with the result in *Board of Natural Resources v. Brown*. The Tenth Amendment protects from Federal appropriation a State's resources – its treasury, timber, and manpower – not merely its policy decisions.

If the Circuit's newfound explanation of federalism is flawed, its application shrinks the Tenth Amendment to a Cartesian point, an abstraction with location but no dimensions. Although Petitioner is required to reallocate scarce resources given him by the voters, to exercise judgment as to how much effort is "reasonable," to guess as to whether to withhold permission where records are incomplete, and to take the blame (and civil liability created by the statute) for erroneous determinations, the Circuit suggests that he is not forced to " 'administer' in the sense of being in charge of a program." App. 11.[9] Although his constituents have in actuality blamed him for his involuntary role, the holding finds no accountability problem since with a better grasp of the law they would not do so. App. 12 n.8.[10]

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[9] If CLEOs are not in charge of the statutory "program," one is left to wonder just who is. The CLEOs set the standards, conduct the reviews, allow or stop the transfer, set out the justification for denials, and are subject to suit if they err.

[10] Professor Merritt suggests the statute at issue poses no fewer than three misplaced accountability problems. First, State officials will be blamed for shortfalls if resources are diverted to the Federal objective; if Petitioner's office cannot respond to a crime in progress, or patrol strength is thinned, he and not Congress will be held accountable. Second, constituents may

The conflict between the Ninth Circuit and *New York* is absolute. If the Ninth Circuit is correct, then *New York* is wrong: the Federal government *could have* ordered State officials to take title to the waste and build appropriate disposal sites. Indeed, the national sovereign could have commanded them to reallocate their resources in any way it desired. There could have been no problem with misplaced accountability, since all requirements were imposed by Federal law. An identical conflict exists with the circuit disposition of *Board of Natural Resources v. Brown*, holding that the Federal government could not bar sale of State resources.

The Circuit decision reduces to a simple proposition: the national government may not make States its regional offices, for regional offices have discretion, but it may make them its messengers and file clerks. Principles of federalism are violated only if States are left with some discretion, not if they are bypassed and blind obedience is demanded of their servants. This strange understanding of dual sovereignty opens the door to national legislators, naturally desirous of claiming credit for action and yet of avoiding blame for its costs, to claim credit

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blame the State official for the underlying law; this has already happened to Petitioner. Third, constituents denied privileges by the adjudications forced upon State officials will blame the officials for a supposedly incorrect decision. This, too, has already been Petitioner's lot. D. Merritt, *Three Faces of Federalism*, 47 Vand. L. Rev. 1563, 1580 n.65 (1994). *See* App. 65-66.

for programs created yet shift the entire cost of operation to the State official of their choice.[11]

From the distance of two centuries, the novelty of the Framers' creation is easily overlooked. In creating a federal structure, they disregarded the first concept of contemporary political science – that there could be no *imperium in imperio*, no supreme ruling power within a supreme ruling power – and substituted a concept whereby *imperium* remained with the people, who apportioned it between two different sovereigns. *See generally* B. Bailyn, The Ideological Origins of the American Revolution 198-229 (1967). The Framers took comfort in the reflection that "Power is almost always the rival of power." *Federalist No. 28* (A. Hamilton). Rather than fearing the inefficiency of divided power, they rejoiced that

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the

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[11] Tenth Amendment analysis indeed understates the impact of this statutory innovation upon the Constitutional scheme. The President, charged with "tak[ing] care that the laws be faithfully executed" Art. II, §3, and with appointing "inferior officers" for that duty, Art. II, §2 is no longer empowered or accountable: Congress simply conscripts non-federal employees for the duty. The strictures of *Buckley v. Valeo*, 424 U.S. 1, 132-36 (1976) and *Bowsher v. Synar*, 478 U.S. 714 (1986) are thus sidestepped. The national government's taxing and spending powers, Art. I, §8, subject to the requirement of appropriation and published budget, Art. I §9, are likewise evaded by conscription of another sovereign's resources. The people of the States retain a republican form of government , Art. IV, §4, only to the doubtful extent that a republic can be said to exist where the people cannot fix the duties and powers of those they elect and the uses of the resources they appropriate.

> portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Federalist No. 51 (J. Madison). These practical judgments have withstood the hard test of two centuries. They are set at nought by the Ninth Circuit's construction of the Tenth Amendment.

We respectfully suggest that the Circuit's view of that amendment marks a complete abandonment of the teachings of *New York*, conflicts with *Board of Natural Resources*, and marks an abrogation of the core principles of federalism.

CONCLUSION

For the foregoing reasons we respectfully submit that the Court should grant a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

DAVID T. HARDY
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed September 8, 1995]

Nos. 94-16940/94-17002

D.C. No. CV-94-00113-JMR

RICHARD MACK, Sheriff of Graham County, Arizona,

Plaintiff-Appellee-Cross-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court for the District of Arizona John M. Roll, District Judge.

Argued and Submitted

July 11, 1995 – San Francisco, California

OPINION

[Filed September 8, 1995]

Before: Herbert Y.C. Choy, William C. Canby, Jr., and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Canby; Partial Concurrence and Partial Dissent by Judge Fernandez

Opinion

CANBY, Circuit Judge:

Sheriffs Richard Mack and Jay Printz, in separate actions, challenged the constitutionality of the Brady Handgun Control Act, P.L. 103-159, 107 Stat. 1536 (1993), codified at 18 U.S.C. § 922(s). The main issue on appeal concerns the district courts' respective holdings that section 922(s)(2) of the Brady Act, requiring local law enforcement officials to perform background checks of handgun purchasers, violates the Tenth Amendment. We conclude that the Act is constitutional, and we accordingly reverse the judgments of the district courts.

FACTS

The Brady Act, passed in 1993 as an amendment to the Gun Control Act of 1968, imposes a waiting period of up to five days for the purchase of a handgun, and subjects purchasers to a background check during that period.[1] See 18 U.S.C. § 922(s)(1). Within five years from the effective date of the Act, such checks will be performed instantaneously through a national criminal background check system maintained by the Department of Justice, 18 U.S.C. § 922(t), but in the meantime the background checks must be performed by the Chief Law Enforcement Officer (CLEO) of the prospective purchaser's place of residence. 18 U.S.C. § 922(s)(2). The Act

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[1] The waiting period and background check prescribed by the Act are not required in States that have permit systems meeting standards prescribed by the Act. 18 U.S.C. § 922(s)(1)(C), (D).

requires CLEOs to "make a reasonable effort to ascertain . . . whether receipt or possession [of a handgun by the prospective buyer] would be in violation of the law. . . ." Id. The CLEO performs the check on the basis of a sworn statement signed by the buyer and provided to the CLEO by a federally-licensed gun dealer. 18 U.S.C. § 922(s)(1)(A). If the CLEO approves the transfer, he or she must destroy the buyer's statement within twenty business days after the statement was made. 18 U.S.C. § 922(s)(6)(B)(i). If the CLEO disapproves the transfer, the CLEO must provide the reasons for the determination within twenty business days if so requested by the disappointed purchaser. 18 U.S.C. § 922(s)(6)(C).

Richard Mack and Jay Printz, as sheriffs, are the CLEOs in their respective jurisdictions of Graham County, Arizona, and Ravalli County, Montana. They brought these actions in their local federal district courts to challenge the Brady Act's provisions imposing duties upon them. Mack and Printz both invoked the Tenth and Fifth Amendments. Mack also challenged the Act as violating the Thirteenth Amendment.

Both district courts held that section 922(s)(2) of the Act, by imposing on the sheriffs a mandatory duty to conduct background checks, violated the Tenth Amendment as interpreted by the Supreme Court in *United States v. New York*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). See *Mack v. United States*, 856 F. Supp. 1372 (D. Ariz. 1994); *Printz v. United States*, 854 F. Supp. 1503 (D.

Mont. 1994).[2] Neither court enjoined the provisions of the Act requiring CLEOs to explain the reasons for rejecting a purchase application, § 922(s)(6)(C), and requiring destruction of records, § 922(s)(6)(B). The *Printz* decision noted that the requirement of a statement of reasons became optional once the mandatory background check was invalidated, and that the provision for destruction of records was "de minimis."

In *Mack*, the district court also held that the criminal provisions of the Act applied to CLEOs, and were void for vagueness under the Fifth Amendment because they made it a crime for CLEOs to fail to make a "reasonable effort" to ascertain the lawfulness of a prospective handgun purchase. The *Printz* court held that the criminal provisions did not apply to CLEOs. Finally, the *Mack* court rejected Mack's Thirteenth Amendment challenge. Both district courts held that the invalid portions of the Act were severable, and accordingly refused to hold the entire Act unconstitutional.

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[2] Four other district courts have ruled on whether the interim provisions of the Brady Act violates the Tenth Amendment. *See Romero v. United States*, 883 F. Supp. 1076 (D. La. 1995) (provisions of Brady Act requiring CLEOs to perform background checks, destroy sworn statements, and provide written response to those denied a handgun, held unconstitutional); *Frank v. United States*, 860 F. Supp. 1030 (D. Vt. 1994) (provision of Brady Act requiring CLEOs to perform background checks unconstitutional); *McGee v. United States*, 863 F. Supp. 321 (S.D. Miss. 1994) (same); *Koog v. United States*, 852 F. Supp. 1376 (W.D. Tex. 1994) (interim provisions not unconstitutional).

In both actions, both sides appealed.[3] The sheriffs primarily dispute the holdings of severability, while the United States contends that the entire Act is constitutional.[4]

ANALYSIS

I. THE TENTH AMENDMENT CHALLENGE

No one in this case questions the fact that regulation of the sales of handguns lies within the broad commerce power of Congress.[5] The issue for decision is whether the manner in which Congress has chosen to regulate in the Brady Act violates the Tenth Amendment.

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[3] Handgun Control, Inc., et al., Senator Paul Simon, and the State of Ohio, have filed briefs as amici curiae in support of the United States. The Law Enforcement Alliance of America filed an amicus curiae brief in support of Mack.

[4] The United States also argues that, if the disputed provisions are unconstitutional, the injunction should prevent enforcement only against the two sheriffs because they did not bring class actions. Our disposition of the appeal makes it unnecessary for us to address this contention.

[5] Nor is any question raised by the Supreme Court's recent decision in *United States v. Lopez*, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), holding that Congress lacked authority under the commerce clause to enact the Gun Free School Zones Act. Unlike the statute in *Lopez*, the Brady Act regulates the *sale* of handguns and thus directly regulates commerce. The Brady Act is an amendment to a comprehensive federal scheme for the regulation of firearms sales that unquestionably affect interstate commerce. The legislative history of the Brady Act also contains findings that gun violence affects commerce, and we accept those findings. *See* H.R. Rep. 103-344, 103rd Cong., 1st Sess., *reprinted in* 1993 U.S.C.C.A.N. 1984, 1985.

The Tenth Amendment provides that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." U.S. Const. amend. X. As a textual matter, therefore, the Tenth Amendment "states but a truism that all is retained which has not been surrendered." *United States v. Darby*, 312 U.S. 100, 124, 85 L. Ed. 609, 61 S. Ct. 451 (1941). By its terms, the Amendment does not purport to limit the commerce power or any other enumerated power of Congress.

In recent years, however, the Tenth Amendment has been interpreted "to encompass any implied constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution." *South Carolina v. Baker*, 485 U.S. 505, 511 n.5, 99 L. Ed. 2d 592, 108 S. Ct. 1355 (1988). Thus, "the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. United States*, 505 U.S. 144, 157, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). The question before us is whether the Brady Act, by requiring CLEOs to perform background checks on handgun purchasers, transgressed such an implied limitation on federal power. We conclude that it did not.

There are numbers of ways in which the federal government is permitted to secure the assistance of state authorities in achieving federal legislative goals. First and most directly, the federal government may coerce the states and their employees into complying with federal

laws of general applicability. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985).[6] Second, Congress may condition the grant of federal funds on the States' taking governmental action desired by Congress. *South Dakota v. Dole*, 483 U.S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987).

These broad categories do not exhaust, however, the means by which the federal government can enlist state employees in implementing federal programs. State judicial and administrative bodies may be required to apply federal law. *Testa v. Katt*, 330 U.S. 386, 91 L. Ed. 967, 67 S. Ct. 810 (1947); *FERC v. Mississippi*, 456 U.S. 742, 760-61, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982). The federal government may offer to preempt regulation in a given area, and permit the states to avoid preemption if they regulate in a manner acceptable to Congress. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290-91, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981).

The federal government has been permitted effectively to compel the states to issue registered rather than bearer bonds. *South Carolina v. Baker*, 485 U.S. 505, 514, 99 L. Ed. 2d 592, 108 S. Ct. 1355 (1988). Finally, the federal government has been permitted to require state utility regulators to consider prescribed federal standards in determining regulatory policies. *FERC v. Mississippi*, 456 U.S. at 765. In the course of the latter ruling, the Supreme

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[6] It is true that this principle was rejected for certain state functions in *National League of Cities v. Usery*, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976), but *National League of Cities* was expressly overruled in *Garcia*, 469 U.S. at 557, and *Garcia* remains the law controlling us.

Court referred to and rejected the "19th century view" that "Congress has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it." *Id.* at 761 (quoting *Kentucky v. Dennison*, 65 U.S. 66, 24 How. 66, 107, 16 L. Ed. 717 (1861)). That view, said the Court, "is not representative of the law today." *Id.* "The federal government has some power to enlist a branch of state government . . . to further federal ends." 456 U.S. at 762.

Against this background, there would appear to be nothing unusually jarring to our system of federalism in the Brady Act's requirement that CLEOs, during a five-year interim period, "make a reasonable effort to ascertain" the lawfulness of handgun purchases. The obligation imposed on state officers by the Brady Act is no more remarkable than, say, the federally-imposed duties of state officers to report missing children, 42 U.S.C. § 5779(a), or traffic fatalities, 23 U.S.C. § 402(a).

Mack and Printz, however, contend that the precedential background set forth above was changed by *United States v. New York*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992), and that the federal government is now flatly precluded from commanding state officers to assist in carrying out a federal program. We do not read *New York* that broadly.

Although we concede that there is language in *New York* that lends support to the view of Mack and Printz, that language must be interpreted in the context in which it was offered. *New York* was concerned with a federal intrusion on the States of a different kind and much greater magnitude than any involved in the Brady Act.

The constitutional evil that *New York* addressed was one recognized by several of the cases already cited: the federal government was attempting to direct the States to enact their own legislation or regulations according to a federal formula.

New York involved the constitutional validity of the Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021b et. seq. The part of the Act that the Court found to violate the Tenth Amendment was the so-called "take title" provision. Under that provision, a State that failed to regulate radioactive waste according to congressional standards was simply given title to the waste within its borders (which previously would have been in private hands). The waste then became the total responsibility of the State as owner. The alternative to this unacceptable prospect was for the State to legislate or regulate in a manner that Congress dictated, and "a direct order to regulate, standing alone, would . . . be beyond the power of Congress." *Id.* at 176. Thus, in response to the government's argument that a strong federal interest supported the "take title" provision, the Court in *New York* stated: "whether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable federal regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact state regulation." *Id.* at 178. In the same vein was the Court's conclusion after reviewing the debates at the time of the founding of the Constitution:

> We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain

> acts, it lacks the power directly to compel the States to require or prohibit those acts. E.g., *FERC v. Mississippi*. . . . The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

Id. at 166.

Other decisions of the Supreme Court have recognized this proposition that the federal government cannot coerce States into performing the ultimately sovereign acts of legislating or regulating in a manner specified by the federal government. In *Virginia Surface Mining*, the Court noted that the provision of an alternative of federal regulation rendered federal standards for state regulation permissible; because the State had a constitutional option, "there can be no suggestion that the Act commandeers the legislative processes by directly compelling them to *enact and enforce* a federal regulatory program." *Virginia Surface Mining*, 452 U.S. at 288 (emphasis added). Similarly, In *FERC v. Mississippi*, the Court noted that the federal command that the State "consider" federal alternatives was constitutional because "[t]here is nothing in PURPA 'directly compelling' the States to enact a legislative program." *FERC v. Mississippi*, 456 U.S. at 765.

New York, then, is best read as a case that draws a line already partly delineated in *Virginia Surface Mining* and *FERC v. Mississippi*: the federal government is not entitled to coerce the States into legislating or regulating according to the dictates of the federal government. Certainly *New York* did not purport to overrule *Virginia Surface*

Mining or *FERC v. Mississippi*, or even to disavow the latter decision's rejection of the nineteenth century view that the federal government cannot command state employees. *New York* can be read consistently with these cases as an instance where "the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, cf. *New York*." *United States v. Lopez*, 131 L. Ed. 2d 626, 115 S. Ct. 1624, 1642 (1995) (Kennedy, J., concurring); *see also Board of Natural Resources v. Brown*, 992 F.2d 937, 947 (9th Cir. 1993) ("direct commands to the states to regulate according to Congress's instructions" "violate the Tenth Amendment as interpreted by *New York*").[7]

There are good reasons for focusing Tenth Amendment concern on federal coercion of a State's enactment of legislation or regulations or creation of an administrative program. These activities are inherently central acts of a sovereign; if an area of state activity is to be protected from direct coercion by an implication drawn from the Tenth Amendment, legislating and regulating are prime candidates. "[T]he power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. at 761. There is a second reason, also, emphasized in *New York* itself. Democratic governments must be politically accountable. When the

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[7] Thus we conclude that when the Court in *New York* stated that "[t]he Federal Government may not compel States to enact or *administer* a federal regulatory program," the Court meant "administer" in the sense of being in charge of a program and making policy decisions with respect to the program. *New York*, 505 U.S. at 188.

federal government requires the States to enact legislation, the enacted legislation is *state* legislation. Thus, it will likely "be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision." *New York*, 505 U.S. at 169. When the federal government itself imposes a requirement on a state official, the requirement is more clearly an act of the federal government and thus does not, to the same extent, undermine political accountability.[8]

The Brady Act is not the kind of a federal mandate condemned by *New York*, nor does it present the concerns related above. The Brady Act does not embody a mandate to the "States" in the sovereign sense discussed in *New York*, *FERC v. Mississippi*, or *Virginia Surface Mining*. The Brady Act is a regulatory program aimed at individuals and not the States. It is true that, for a limited period of time, the Act requires state law enforcement officials, the CLEOs, to make reasonable efforts to assist in carrying out the federal program. But the CLEOs are not being commanded to engage in the central sovereign processes of enacting legislation or regulations. They are not even being asked to produce a state policy, for which the state must bear political accountability. Instead, they are

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[8] We recognize that some individuals may criticize local officials for implementing federal regulations. But when federal regulations are imposed by the federal government, political accountability by the federal government for those regulations remains.

directed to serve for a temporary period as law enforcement functionaries in carrying out a federal program. Their activities are not alien to their usual line of work, and represent a minimal interference with state functions. In that sense, their duties are not different from other minor obligations that Congress has imposed on state officials.

Mack and Printz do not agree that the Brady Act's interference with their state duties is minimal. They point out that there are many factors that may make a prospective handgun purchase illegal under the Act. A purchase is unlawful, for example, if the purchaser is a fugitive, is an unlawful user of a controlled substance, has been adjudicated a mental defective, has been dishonorably discharged from the armed forces, has renounced his citizenship, or is under certain restraining orders involving an intimate partner. 18 U.S.C. § 922(g). They also contend that it will be unduly burdensome to give reasons for rejecting a proposed purchase, within 20 days of being requested by the disappointed purchaser. *See* § 922(s)(6)(C). Mack and Printz point out that they are sheriffs in rural counties with limited staffs and resources. To research for all of these disabilities and to give reasons for rejection, Mack and Printz argue, will either take all of their time or so much of it that they will be unable to perform their regular county duties.

The government, on the other hand, argues that there is no requirement that CLEOs pursue all of these avenues of potential disqualification. They are enjoined only to "make a reasonable effort," § 922(s)(2), and the statute's only fixed requirement is a search in whatever recordkeeping systems are available and in a national

system. *Id.* A reasonable effort, the government contends, might in the circumstances of Mack and Printz simply be a check of the existing computer records.

We agree, and the government concedes, that there is likely to be some point at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment. Surely the federal government cannot stall the state government in its tracks by imposing all-consuming federal duties on the State's employees. We conclude, however, that the Brady Act does not approach that point. Mack and Printz have not demonstrated that the Act will interfere unduly with their duties. Indeed, to a considerable degree, the dispute over the magnitude of the burden imposed upon them is not ripe for resolution. Mack and Printz have not been subjected to any interpretation of the Act, or any attempt to enforce it against them, that requires them to do more than check computer records. On this record, we cannot conclude that "a reasonable effort" inevitably requires more than this minimum for Mack and Printz. To perform such computer checks, and to explain reasons for rejection when and if disappointed purchasers so request, has not been shown to constitute the kind of interference with state functions that would raise Tenth Amendment concerns. It follows even more strongly that the minimal requirement of destruction of records presents no constitutional problem.

We also find no support for the Tenth Amendment claims of Mack and Printz in the cases from our circuit that they cite. *See Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993); *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978); *Brown v. Environmental Protection Agency*,

521 F.2d 827 (9th Cir. 1975), *vacated as moot* 431 U.S. 99 (1977).[9] In *Board of Natural Resources* we held that the Forest Resources Conservation and Shortage Relief Act violated the Tenth Amendment. *Board of Natural Resources*, 992 F.2d at 947. That Act however – akin to the statute in *New York* – required the States to issue regulations and was far more demanding of state officials than the Brady Act. *See Board of Natural Resources*, 992 F.2d at 947. *Best* applied the National League of Cities governmental function test, *Best*, 573 F.2d at 1102, which has been abandoned. *See Garcia Metropolitan Transit Authority*, 469 U.S. at 531 (overruling *National League of Cities*). And *Brown*, like *Board of Natural Resources*, involved regulations that clearly intruded upon a state's sovereignty, unlike the contested provisions of the Brady Act. *See Brown*, 521 F.2d at 829-830 (State had to develop and implement plan for implementing, enforcing, and maintaining national air standards). Additionally, *Brown* relied upon the Tenth Amendment view espoused in *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107, 16 L. Ed. 717 (1861), *overruled by Puerto Rico v. Branstad*, 483 U.S. 219, 97 L. Ed. 2d 187, 107 S. Ct. 2802 (1987), that "the Federal Government . . . has no power to impose on a State officer, as such, any duty whatsoever. . . . " *See Brown*, 521 F.2d at 841. As the Supreme Court has made clear, the view

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[9] Although the Supreme Court vacated *Brown*, on remand we stated: "Except as modified herein, we continue to regard, or once more adopt if necessary, our opinion in *Brown I* as the law of this circuit." *Brown v. EPA*, 566 F.2d 665, 666 (9th Cir. 1977). For reasons discussed later in the text, however, the precedential value of *Brown* is limited.

espoused in *Kentucky v. Dennison* is no longer representative of the law. *FERC*, 456 U.S. at 761.[10] We therefore reject Mack's and Printz's Tenth Amendment challenges to the Brady Act.[11]

II. THE FIFTH AMENDMENT VAGUENESS CHALLENGE

Section 924(a)(5) of the Act provides that "[w]hoever knowingly violates subsection (s)" of the Act is subject to fine or imprisonment or both. Mack and Printz contend that this provision subjects them to criminal liability for

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[10] The Law Enforcement Alliance of America, as Amicus Curiae, argues that the method by which the Brady Act was enacted violates the "structuralist" test articulated by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), under which the States are protected from overreaching by the federal government primarily by "the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority." *Id.* at 552. The Court in *New York* has indicated that *Garcia* is limited to statutes that subject "a State to the same legislation applicable to private parties." *New York*, 505 U.S. at 160. But even if we assume that Garcia's structuralist test were applicable, we cannot accept the Law Enforcement Alliance's view that the Brady Act would fail the test. There is no showing that the States affected were "deprived of any right to participate in the national political process" or were "singled out in a way that left [them] politically isolated and powerless." *South Carolina v. Baker*, 485 U.S. at 513.

[11] Because we hold that the Brady Act does not violate the Tenth Amendment, we do not consider whether section 922(s)(2) is severable from the remainder of the Act, or whether the district courts erred in issuing injunctions that applied statewide.

failing to "make a reasonable effort" to ascertain whether a particular purchase would violate the law, as required by section 922(s)(2). So construed, the criminal provision is unconstitutionally vague, according to Mack and Printz, because a person of reasonable intelligence has no way of knowing what may constitute a "reasonable effort."

It is not at all clear, however, that section 924(a)(5) is intended to apply to the Act's requirements imposed upon CLEOs. Indeed, the Montana district court viewed the criminal prohibition as ambiguous in that regard, and concluded that it did not apply to CLEOs.

We decline to reach this issue, however, because it is not ripe.[12] Mack and Printz have not been charged under the Act with any criminal violations, nor are they likely to be. The United States represented during oral argument that the Justice Department's official position is that the criminal sanctions of the Brady Act do not apply to CLEOs. Because Mack and Printz do not face a "credible threat of prosecution," *San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 821 (9th Cir. 1987), aff'd 489 U.S. 214, 103 L. Ed. 2d 271, 109 S. Ct. 1013 (1989), there is no "case or controversy." *See Campbell v. Wood*, 18 F.3d 662, 680 (9th Cir.), cert. denied, 114 S. Ct. 2125

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[12] Mack and Printz also make a vagueness argument based on their exposure to civil proceedings. Neither Mack nor Printz has been subjected to civil proceedings, nor have they pointed to any civil proceeding to which they would be subject that would violate the Fifth Amendment. In any event, because this issue was not raised below, we decline to reach it.

(1994).[13] In the extremely unlikely event that a criminal prosecution is one day brought against a CLEO, the constitutional objection may be raised in defense at that time.

We therefore vacate the ruling of the District Court of Arizona that the criminal provisions apply to CLEOs and are void for vagueness, as well as the ruling of the District Court of Montana that the criminal provisions do not apply to CLEOs. These claims are to be dismissed as unripe.

III. THE THIRTEENTH AMENDMENT CHALLENGE

Mack also challenges the Brady Act as violating the Thirteenth Amendment. The Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII. According to Mack, section 922(s) requires him to perform labor for the United

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[13] Mack and Printz also suggest that they need not face a reasonable threat of prosecution. None of the cases that they cite support this proposition, however. *See Board of Natural Resources*, 992 F.2d at 945 (plaintiff showed injury in fact); *Epperson v. Arkansas*, 393 U.S. 97, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968) (Court did not reach the justiciability issue); *Beacon Journal Pub. Co. v. Unger*, 532 F. Supp. 55, 58 (N.D. Ohio 1982) (plaintiff showed injury in fact); *Brown v. EPA*, 521 F.2d at 831 & 829 n.1 (the EPA had already given a notice of violation.); *Gentile v. State Bar*, 501 U.S. 1030, 115 L. Ed. 2d 888, 111 S. Ct. 2720 (1991) (plaintiff charged with violation); *Babbitt v. Farm Workers*, 442 U.S. 289, 299-300, 60 L. Ed. 2d 895, 99 S. Ct. 2301 (even though plaintiffs did not face an imminent threat of prosecution, statute was "sure to work the injury alleged," and so Court found a case or controversy).

States or face legal sanctions, even though he is not a federal employee.

Unlike a slave, however, Mack can quit work at any time. By doing so, he escapes all compulsion. The requirements of the Brady Act are not placed on Mack personally; the duties that are imposed attend the office. Thus the Brady Act does not coerce Mack "by improper or wrongful conduct" into service by causing and intending to cause him "to believe that he . . . has no alternative but to perform the labor." *Brogan v. San Mateo County*, 901 F.2d 762, 764 (9th Cir. 1990) (citation omitted). The fact that *Mack*, if he continues to be sheriff, must perform certain duties as a condition of his employment, does not violate the Thirteenth Amendment. *Cf. United States v. 30.64 Acres of Land*, 795 F.2d 796, 800-01 (9th Cir. 1986) (requiring lawyers to perform pro bono services does not violate Thirteenth Amendment because requirement is a condition of practicing law).

CONCLUSION

The Brady Act violates neither the Tenth nor Thirteenth Amendment. Mack and Printz's Fifth Amendment vagueness challenge is not ripe. Accordingly, the district courts' injunctions prohibiting the United States from enforcing the disputed provisions of the Brady Act are vacated, and the district courts' judgments are reversed insofar as they invalidate portions of the Act. The portions of the cross-appeal in *Mack* and the appeal in *Printz* that challenge the district courts' rulings of severability are dismissed as moot; in all other respects the rulings challenged by Mack and Printz, are affirmed. The cases

are remanded with instructions to dismiss the vagueness challenges as unripe. The United States is entitled to its costs on appeal.

No. 94-16940 (Appeal by United States) **REVERSED**.

No. 94-17002 (Cross-appeal by Mack) **AFFIRMED** in part and **DISMISSED** in part.

No. 94-36193 (Appeal by Printz) **AFFIRMED** in part and **DISMISSED** in part.

No. 95-35037 (Cross-Appeal by United States) **REVERSED**.

FERNANDEZ, Circuit Judge, concurring and dissenting:

I concur in parts II and III of the majority opinion, but I respectfully dissent from part I.[1]

This case makes palpable the notion that the states are just a part of the national government, a notion that was rejected when this country was founded. Congress has previously attempted to order the states to legislate or regulate in particular ways, and it has failed at that. *See, e.g., New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408, 120 L. Ed. 2d 120 (1992); *Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993); *cf. United States v. Best*, 573 F.2d 1095, 1102-03 (9th Cir. 1978). That is to say, Congress has failed when it has not given the states the option to avoid the intended yoke. *See, e.g., FERC v. Mississippi*, 456 U.S. 742, 766, 102 S. Ct. 2126,

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[1] Given the majority's decision, I see no need to discuss the criminal provisions of this law, the severability of the law's provisions, or the breadth of the injunctions imposed by the district courts.

2141, 72 L. Ed. 2d 532 (1982); see also *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 101 S. Ct. 2352, 69 L. Ed. 2d 1 (1981); *Brown v. EPA*, 521 F.2d 827 (9th Cir. 1975), vacated by 431 U.S. 99, 97 S. Ct. 1635, 52 L. Ed. 2d 166 (1977), *on remand* to 566 F.2d 665 (9th Cir. 1977). Even those determinations are not without their problems because government." *See FERC*, 456 U.S. at 782, 102 S. Ct. at 2150 (O'Connor, J., dissenting).

Now Congress has avoided those issues, but it has done so by eliminating the niceties of the federal-state relationship entirely. Rather than ordering state legislatures or agencies to adopt a scheme for vetting requests for gun transfers, Congress has avoided that hindrance and dragooned the state officials directly. Under this new approach, the states have nothing to say about it. Their officials are ordered to become part of a federal gun control program at the state's own expense and are ordered to engage in various tasks necessary to administer that program. Those officials must make a "reasonable effort" to decide whether receipt of a weapon by a proposed transferee "would be in violation of the law" of the United States. 18 U.S.C. § 922(s)(2). Those efforts must include "research in whatever State and local recordkeeping systems are available *and* in a national system designated by the Attorney General." *Id.* (emphasis added). And the work must be done within five business days. Id. The officials must also dispose of the materials and may not make any use of them other than that directed by Congress. *Id.* § 922(s)(6)(B). They must provide written explanations for negative determinations upon request. *Id.* § 922(s)(6)(C). Presumably those officials must also adopt appropriate procedures for

the carrying out of those functions. Perhaps that is not forced administration of the federal gun regulation program, but I fail to see why it is not.

Of course, the states are to bear the full cost of these tasks, and, unless the states adopt a local permit system, they cannot opt out of the federal program. If a state does not choose to engage in the regulation of this part of commerce – commerce in weapons – that makes no difference at all. In other words, state officials are conscripted by the federal government to fulfill its purposes and they can do nothing about that.

The government argues that this is much more respectful of state sovereignty than the legislation struck down in *New York*. I do not agree. If the Tenth Amendment has anything to do with the separate sovereign dignity of the states, it is difficult to see how that dignity is not undermined by the reality of a command that they commit their resources to the carrying out of this kind of federal policy, whether they like it or not.

Moreover, we are not dealing with a situation where a state seeks to stay in the business of regulating commerce in weapons. Quite the contrary. This legislation impacts states that do not wish to do so. I assume that the Supreme Court meant what it said when it said:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several states a residuary and

> inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment.
>
> Whatever the outer limits of that sovereignty may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program.

New York, 505 U.S. at ___, 112 S. Ct. at 2434-35 (citations omitted).

This legislation is a step toward concentrating power in the hands of the federal government, for it treats state officials and workers as if they were mere federal employees. It makes every CLEO's office an office of the federal bureaucracy, funded by the states, but directed from Washington. The time to stop this journey of a thousand miles is at the first step.[2]

Therefore, I respectfully dissent from the majority's determination that the statute does not violate the Tenth Amendment.

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[2] *Cf.* Lao-tzu, Bartlett's Familiar Quotations 65, quotation 1, (1980).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed December 19, 1995]

Nos. 94-16940/94-17002

D.C. No. CV-94-00113-JMR

RICHARD MACK, Sheriff of Graham County, Arizona,

Plaintiff-Appellee-Cross-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant-Cross-Appellee.

JAY PRINTZ, Sheriff/Coroner, Ravalli County, Montana,

Plaintiff-Appellant-Cross-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee-Cross-Appellant.

BEFORE: CHOY, CANBY AND FERNANDEZ, CIRCUIT JUDGES.

The panel has voted unanimously to deny both petitions for rehearing.

The full court has been advised of the suggestions for rehearing en banc and no active judge has requested a vote on whether to rehear the matters en banc. F. R. App. P. 35.

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Sheriff Richard Mack,

Plaintiff

vs. No. CV 94-113-TUC-JMR

United States of America,

Defendant.

ORDER & MEMORANDUM DECISION

[Entered June 28, 1994]

INTRODUCTION

Pending before the Court is plaintiff Graham County Sheriff Richard Mack's complaint for injunctive and declaratory relief against the enforcement of 18 U.S.C. 922(s), commonly referred to as the Brady Act. For the reasons set forth below, the Court finds that subsection 922(s)(2) violates the Fifth and Tenth Amendments of the United States Constitution and will enter partial judgment in favor of the plaintiff on that basis.

The Brady Act

This lawsuit is a challenge to the constitutionality of public law 103-159, 107 Stat. 1536 (1993), codified at 18 U.S.S. 922(s), which amends the Gun Control Act of 1968.[1] The statute, popularly known as the Brady Act,

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[1] Several other courts have had an opportunity to review this matter. See *Printz v. United States*, No. CV 94-35-M-CCL (D. Mont. 1994) (declared unconstitutional); *McGee v. United States*, No. 2:93-CV-67PS (SD Miss.) (declared unconstitutional but

provides for a waiting period of five business days for purchases of handguns from federally-licensed gun dealers. 18 U.S.C. 922(s)(1)(A)(ii). During the waiting period, the "chief law enforcement officer" (CLEO) in each jurisdiction is required to "make a reasonable effort to ascertain . . . whether receipt or possession [of a handgun by the prospective buyer] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General." 18 U.S.C. 922(s)(2). The CLEO is defined as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. 922(s)(8).

The CLEO performs the check on the basis of a sworn statement that the prospective purchaser provides to the gun dealer and that the gun dealer in turn provides to the CLEO. The CLEO must destroy the sworn statement within 20 days of the date of the transfer unless the CLEO determines that the transfer would violate the law. 18 U.S.C. 922(s)(6)(B). If the CLEO determines that the transfer would violate the law, the CLEO must, within 20 days of a request, provide reasons to the denied purchaser for that determination. 18 U.S.C 922(s)(6)(C).

The Brady Act also amends the penalty provision of the existing criminal code by providing that anyone who knowingly violates its provisions shall be subject to a fine, imprisonment, or both. 18 U.S.C. 924(a)(5). CLEOs are specifically exempted from civil liability. 18 U.S.C.

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injunctive relief limited to sole plaintiff); *Koog v. United States*, No. DR-94-Ca-8 (WD Tex. 1994) (constitutionality of Act upheld).

922(s)(7). It is the position of the Department of Justice that criminal sanctions shall not attach to any CLEO who violates any provision of the Brady Act. The Act does not so indicate, however.

The interim procedure outlined above is slated to be replaced by a national instant criminal background check system to be developed and maintained by the Department of Justice within five years from the date of enactment. 18 U.S.C. 922(t)(1). The national system will consist of a computerized database of information gathered from both federal and state criminal records and will be accessible telephonically by federally licensed gun dealers. Once the national data bank is operational, the duties of the CLEO will cease.

Plaintiff Richard Mack is the sheriff of Graham County. As such, he is the chief law enforcement officer of that jurisdiction. Graham County is a sparsely populated rural county of 4500 square miles inhabited by 28,000 residents. The Graham County Sheriff's Office is responsible for law enforcement in the county and consists of a staff of twelve officers, including the sheriff.

Mack has been advised by the Graham County Attorney that he is to enforce the provisions of the Brady Act until a court of competent jurisdiction rules otherwise. Mack alleges that the Brady Act will require him to search nine categories of records, those categories having varying degrees of accessibility. Mack maintains that his responsibilities under state law do not include conducting the type of investigations the Act mandates, and that

he does not have the personnel or funds to do so.[2] He claims that his refusal to perform the duties imposed upon him by the Brady Act would subject him to criminal penalties.

Plaintiff Mack seeks a declaration that 18 U.S.C. 922(s) is unconstitutional as beyond the powers delegated to Congress in Article 1, sec. 8 of the United States Constitution, contravenes the Tenth and Thirteenth Amendments, and is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. Mack asks the Court to enter a permanent injunction against enforcement of the Brady Act.

Upon suggestion of counsel, the Court previously agreed to consolidate Mack's motion for preliminary injunction with his complaint for permanent relief. Also before the Court is defendant United States of America's motion to dismiss, which the parties have agreed may be ruled upon as well. In essence, these procedural mechanisms permit the Court to reach the merits of the case at this time. For the reasons set forth below, the Court finds section 922(s)(2), the provision of the Brady Act that requires local law enforcement officials to conduct a reasonable background search, exceeds Congress's Article I powers in violation of the Tenth Amendment. Additionally, that provision, enforceable by way of criminal sanctions, is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. However,

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[2] In addition to his statutory duties, Sheriff Mack is bound to obey the laws of the United States by his oath of office.

the Court finds this offending provision to be severable from the balance of the Act.

DISCUSSION

Sheriff Mack's Standing to Sue

The first question posed by defendant United States of America is whether this plaintiff has standing to sue. The jurisdiction of the federal courts is limited by Article III, sec. 2 of the Constitution to adjudication of "cases or controversies." U.S.Const. art. III, sec. 2. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To satisfy the core constitutional requirements for standing, a plaintiff must demonstrate that he or she has suffered, or is in imminent danger of suffering, a distinct and palpable personal injury fairly traceable to the defendant's allegedly unlawful conduct and such injury is likely to be redressed by the requested relief. *Allen v. Wright*, 468 U.S. 737, 751 (1984). A citizen's belief that the government is violating the Constitution does not constitute sufficient personal injury to satisfy the Article III standing requirements. *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2143-44 (1992).

In order to reach these claims, the Court must first determine whether the criminal penalty provisions of the Brady Act apply to Sheriff Mack. As recited above, the Brady Act amends the penalty provision of the existing criminal code by providing that "[w]hoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1000.00, imprisoned for not more than 1

year, or both." 18 U.S.C. 924(a)(5). Focusing on the word "whoever," the Court finds that Mack is unequivocally at risk of criminal sanctions should he decide to disobey the statute.

The United States disputes this interpretation and cites a Bureau of Alcohol Tobacco and Firearms "Open Letter" to state and local law enforcement officials explaining the operation of the Brady Act. The Bureau of Alcohol, Tobacco, and Firearms is the federal agency responsible for implementing the Act. The Bureau interprets the mandatory provisions of the Act as merely requiring "some minimal effort to check commonly available records." Moreover, the letter states that it will be left to the discretion of the CLEO to establish enforcement standards based upon the jurisdiction's resources which, depending on the area, could entirely negate the research obligation. The Assistant Attorney General for the Office of Legal Counsel has officially opined that the penalties section of the Act do not apply to chief law enforcement officers.

An agency's interpretation of a statute it administers is entitled to deference only when the statute is silent or ambiguous on the issue presented.[3] In determining whether Congress has expressed "an intention on the

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[3] As the Supreme Court has explained: "First, always, is the question whether Congress has spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . " *Chevron USA v. NRDC*, 467 U.S. 837, 842-43 (1984).

precise question at issue," this Court employs "traditional tools of statutory construction." *Chevron, U.S.A. v. NRDC*, 467 U.S. 837, 843 n. 9 (1984). In so doing, however, it should be emphasized that courts are the final authorities on issues of statutory construction. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987); *Natural Resources Defense Council, Inc. v. Hodel*, 819 F.2d 927, 929 (9th Cir. 1987). Moreover, it is "unclear whether an agency's interpretation of a criminal statute is entitled to deference under *Chevron*." *United States v. Douglas*, 974 F.2d 1046, 1048 n. 1 (1992) (emphasis in original).

It is basic that "as long as the statutory scheme is coherent and consistent, there is generally no need for a court to inquire beyond the plain language of the statute." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989). The relevant provision of the Brady Act imposes liability upon those who knowingly violate its terms.[4] Although the term "whoever" is not defined under the statute, it does not demand further articulation.[5]

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[4] Again, CLEOs are specifically exempted from civil liability. 18 U.S.C. 922(s)(7). It is apparent from this exemption that Congress considered the extent to which it wished to hold a CLEO responsible for enforcement. It is difficult to conclude that Congress meant to preclude criminal liability simply because civil liability has been removed.

[5] Assuming for the sake of argument that the term lacks clarity, several interlocking principles guide this Court's construction to the identical result. First, a statute must be construed, if fairly possible, to avoid constitutional problems. *Communication Workers of America v. Beck*, 487 U.S. 735, 762 (1988). If ambiguous, the more lenient construction in favor of a criminal defendant is required. *United States v. Bailey*, 982 F.2d

Under the plain meaning of the statute, Mack is under threat of criminal penalties and thus possesses an injury that can be redressed. The agency's interpretation to the contrary is entitled to no deference.[6]

The United States asks the Court to additionally consider whether Mack is entitled to bring suit in his official capacity, assuming that he can allege no injury as a private entity. See *Karcher v. May*, 484 U.S. 72, 78 (1987) (appellant state legislators who participated in lawsuit in their official capacities lacked standing to appeal on behalf of legislature when term of office expired); *Bender v. Williamsport Area School District*, 475 U.S. 534, 544 (1986) (plaintiff school board member had "no personal stake in the outcome of the litigation" and therefore did not have standing to file a notice of appeal). Mack's duties under state law are set out in A.R.S. 11-441. Mack has additional practical responsibilities that ensue from his management of his staff and office. Mack has sworn under oath to uphold his duties as sheriff. He has brought this lawsuit identifying himself as the Sheriff of Graham County. The county board has not authorized this suit and the County Attorney has informed Mack that he is not to use county facilities, staff, services or equipment in pursuit of the

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1265, 1270 (9th Cir. 1992). It is only if the language is unclear that the Court need refer to legislative history as an aid to statutory interpretation. *Blum v. Stenson*, 465 U.S. 886, 896 (1984).

[6] At oral argument, counsel for the government cited 28 C.F.R. 0.25 for the proposition that CLEOs would be sheltered from subsequent prosecutions based on the opinion letter even if the interpretation were later to change. The regulation, however, offers Sheriff Mack no such reassurances.

litigation. Mack has retained private counsel to represent him.

The Court finds that there is no difference between Sheriff Mack's personal and official capacities for purposes of the duties imposed upon him by the Brady Act. The Act directs the CLEO as a county agent to perform its statutory mandates. Mack is thus forced to choose between violating his oath or violating the Act, subjecting himself to possible sanctions. Mack has a sufficient stake in the outcome of the proceedings to justify standing, regardless of whether it is characterized as private or official conduct. *See Board of Education v. Allen*, 392 U.S. 236 (1968) (plaintiffs' belief that statute forced them to choose between following oath and statute supplied personal stake necessary for standing).

The United States raises one final point – namely, its theory that Arizona law does not authorize its sheriffs to sue or be sued. Fed. R. Civ. P. 17(b) provides that the capacity to sue must be determined by state law. Pursuant to statute, the office of sheriff is named a county officer. A.R.S. 11-401. The powers of the county to sue and be sued "shall be exercised only by the board of supervisors or by agents and officers acting under its authority and authority of law." A.R.S. 11-201. Mack lists several early cases for the simple proposition that Arizona sheriffs regularly sue and are sued. This is hardly dispositive as "capacity to sue is not jurisdictional and can be waived." *Gonzales v. Arizona Public Service Co.*, 161 Ariz. 84, 87, 775 P.2d 1148, 1151 (App. 1989). Thus far, it would appear that Arizona courts have not had an opportunity to determine the extent of a sheriff's capacity to sue. The Supreme Court of West Virginia, when faced

with a similar issue, ruled that "the capacity to sue is an important incident to the duties of public officers and it is often necessary that such an official be able to ensure that he [or she] is acting properly by seeking court guidance." *State ex rel. Manchin v. Lively*, 170 W. Va. 672, 674, 295 S.E.2d 912, 915 (1982). That court cited with approval the following language found in 67 C.J.S. *Officers* sec. 250 (1978): "public officers have capacity to sue commensurate with their public trust or duties without express statutory authority." *Id. See also State ex rel. Hoagland v. School Dist. No. 13*, 116 Mont. 294, 151 P.2d 168 (1944) (implying right to sue into statute defining county superintendent's duties). This Court concurs in that reasoning. The government's argument was recently rejected in *McGee v. United States*, No. 2:94-CV-67PS (S.D. Miss. 1994). There, the District Court for the Southern District of Mississippi stated:

> "The cases are clear that the appropriate body to bring an action involving counties is the board of supervisors of such county. However, that is not the situation before this Court. Brady directs sheriffs (as chief law enforcement officers) to ascertain if obtaining a gun is in violation of the law, including checking whatever records are available. . . . This directive is not to the county. It is not to the attorney general. It is not any other state agency or to any federal agency."

McGee, slip op. at 5. Nor, it might be added, will the consequences of violating the Act be borne by anyone other than the CLEO.

The Court finds the standing and jurisdiction arguments presented by the United States to fall on all fronts.

It is irrefutable that the Act specifically imposes certain duties on a particular category of individuals – the CLEOs. Sheriff Mack is a CLEO for purposes of this statute. Should Sheriff Mack disregard his statutory responsibilities, he would place himself at risk of its criminal penalties. Thus, Sheriff Mack has standing to challenge the statute on Fifth Amendment grounds because of the potential sanctions he faces. Moreover, Sheriff Mack has standing to raise a Tenth Amendment claim because of his position as the state official to whom Congress has delegated the obligation to enforce federal law.

Commerce Clause and Tenth Amendment

Count One of Mack's Amended Complaint alleges that Congress has exceeded the scope of its powers under the Commerce Clause by legislating the requirement that he perform a background check on potential firearms purchasers. The flip side of this argument is Count Two of Mack's Amended Complaint, which contends that the Act's enforcement scheme infringes upon the state's sovereign powers reserved to it by the Tenth Amendment. As the Supreme Court noted, these inquiries go hand in hand. *New York v. United States*, 112 S.Ct. 2408, 2417 (1992). "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Id.* "In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as

one of ascertaining the limits of the power delegated to the Federal Government under the affirmative provisions of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment." *Id.* at 2419

Turning first to Count One, legislation enacted under the Commerce Clause has a "presumption of constitutionality," *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), and receives "a highly deferential" judicial review. *United States v. Edwards*, 13 F.3d 291, 293 (9th Cir. 1993). "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *FERC v. Mississippi*, 456 U.S. 742, 754 (1982) (internal citations and quotations omitted)

Applying these principles to the facts at hand, it is clear that the activity regulated by the Brady Act, the purchase of handguns, affects interstate commerce. This is not even a debatable question. *See Huddleston v. United States*, 415 U.S. 814, 833 (1974) (Congress is permitted to regulate intrastate redemption of firearms from pawnshops on the basis that such transactions affect interstate commerce); *Edwards*, 13 F.3d at 293 (Gun Free School Zones Act, prohibiting possession of firearms within 1,000 feet of a school, represents permissible exercise of Congressional power); *United States v. Evans*, 928 F.2d 858 (9th Cir. 1991) (the violence created through the possession of firearms adversely affects the national economy

and therefore comes within the scope of Congressional authority).

The second prong of the analysis requires the Court to determine whether there is a rational connection between the background check requirement and the regulation of the transfer of handguns. The purpose of the investigation is to determine if a potential purchaser is legally entitled to possess a firearm. 18 U.S.C. 922(g). See also U.S.Const. art. I, sec. 8, cl. 18 (granting Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its delegated powers).

The issue is not, however, whether Congress possesses the raw power to regulate the transfer of handguns. Clearly it does. The thorny question is whether the Tenth Amendment limits the power of Congress to regulate in the way it has chosen. The district court for the District of Montana framed the inquiry as follows: "This case turns on the proper relationship between the federal government and the several states, and in particular, on the constitutionality of federally imposed, unfunded mandates to the states." *Printz v. United States*, No. CV 94-35-M-CCL, slip op. at 3-4 (D. Mont. 1994). The Tenth Amendment confirms that the federal government has fixed powers. U.S. Const. amend. X (the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). "[A]ll is retained which has not been surrendered." *New York*, 112 S.Ct. at 2418 (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).

In *New York v. United States*, the Supreme Court reviewed the history of the decisional law construing the delicate balance struck between the federalist compromise and a state's authority. The Supreme Court stated without hesitation that "[w]here a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." *Id.* at 2429. *Compare FERC v. Mississippi*, 456 U.S. at 762 (federal government may enlist the judicial branch of state government to further federal ends). The *New York* Court held that the federal government could not force the state of New York to regulate nuclear waste in a certain way because in doing so, Congress exceeded its Article I powers. The statute offered state governments the choice of either regulating pursuant to Congressional dictates or accepting ownership of low level radioactive waste. Justice O'Connor, writing for the majority, held the statute invalid under the Commerce Clause and the Tenth Amendment because it " 'commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *New York*, 112 S.Ct. at 2428 (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

The parties present two very different views of the Brady Act. The government maintains that the Act's provisions are discretionary, cooperative, and clerical. The government goes so far as to say that were Sheriff Mack to find in his discretion and under the circumstances that a reasonable effort meant no investigation whatsoever,

that would be acceptable compliance.[7] For his part, Mack interprets the Act to be a direct command from Congress. Such a command would clearly involve the type of government conduct found to be unconstitutional in *New York v. United States,* 112 S.Ct. at 2425

Relying upon *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), the government first maintains that the Brady Act is a statute of general applicability and thus does not intrude upon the special preserve of state sovereignty. At issue in *Garcia* was whether Congress had exceeded its powers by requiring the states to comply with the Fair Labor Standards Act minimum wage and overtime requirements. In that case the Supreme Court found that the state "face[d] nothing more than the same obligations that hundreds of thousands of other employers, public as well as private, have to meet." *Garcia,* 469 U.S. at 554. Under *Garcia,* if states object to complying with FLSA, their recourse is to the political process of state participation in federal government action.[8] *Id.* at 556.

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[7] The government claims that the mandated actions are de minimis and therefore escape constitutional review. This position was accepted by the district court in *Koog v. United States,* No. DR-94-Ca-8 (W.D. Tex. 1994).

[8] Prior to *Garcia,* the FLSA was not applicable to states when they were performing traditional governmental functions. *National League of Cities v. Usery,* 426 U.S. 833 (1976). The *Garcia* Court rejected *National League of Cities*'s "traditional government functions" test. *Garcia,* 469 U.S. at 556-57. Thus, the government's argument to the contrary herein does not merit further comment.

The government's efforts to characterize the Brady Law as a law of general applicability are disingenuous. The specific dictates imposed upon state law enforcement personnel comprises the crux of this lawsuit. Those duties are not generally applicable but specially meted out to the CLEOs. Unlike the identical responsibilities imposed upon government and private employers under the FLSA, private entities have no corresponding duties under the Brady Act.

Next, the government dismisses the holding in New York as affecting only those federal laws which compel a state to legislate. Without doubt, the Supreme Court found the prospect of compelled legislation to be constitutionally objectionable. The reason for this principle, the Supreme Court explained, is that "where the federal government compels States to regulate, the accountability of both state and federal officials is diminished." *New York*, 112 S.Ct. at 2424. That loss of accountability, the Court concluded, undermines the purpose of federalism – to ensure that the interests of the citizen are adequately represented. *Id.* at 2431-32.

The government claims that the Brady Act does not usurp accountability from the states because the Act does not require, much less compel, the state legislature to do anything. *FERC v. Mississippi*, 456 U.S. at 764 (Public Utility Regulatory Policies Act of 1978 held constitutional because did not contain a federal command to promulgate and enforce regulations but merely required the states to consider federal standards); *Hodel*, 452 U.S. at 288 (Supreme Court upheld Surface Mining Control and Reclamation Act of 1977 because "the States are not compelled to enforce the steep-slope standards, to expend

any state funds, or to participate in the federal regulatory program in any manner whatsoever.").

True, the Brady Act does not require the state to legislate in order to enforce its provisions. In this respect, however, it is more like the "take title" section of the unconstitutional statute in *New York* which essentially operated upon default. This provision was found to be constitutionally defective even though no affirmative action was demanded of the state. In this case, the state is forced to expend time and resources toward implementation of the Act, even though legislation is not mandated.[9]

Finally, the government claims that the Tenth Amendment is not violated by a congressional order that a state implement a federal directive where doing so is exactly the type of activity the state ordinarily engages in. The government offers *Testa v. Katt*, 330 U.S. 386 (1947), in support of this proposition. Testa involved the state of Rhode Island's refusal to permit lawsuits to be filed in its courts under federal price control legislation which conferred dual jurisdiction upon state and federal courts. The Supreme Court held that Rhode Island could not refuse jurisdiction over federal claims to be adjudicated in its courts. *Testa*, 330 U.S. at 394. In evaluating the applicability of *Testa*, the *New York* Court declared that Testa was grounded upon the Supremacy Clause rather than the Tenth Amendment. *New York*, 112 S.Ct. at 2429-30.

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[9] For instance, the CLEO must address the reasons for ineligibility and destroy the sworn statement.

Accord FERC v. Mississippi, supra (Mississippi Public Service Commission had jurisdiction to entertain claims arising out of the Public Utilities Regulatory Policy Act of 1978). *Testa* is not controlling here.

In summary, the Brady Act's provision mandating that state law enforcement officials perform a background check exceeds Congressional powers under the Commerce Clause, thereby violating the Tenth Amendment.

Fifth Amendment Vagueness Claim

Mack also chailenges the Brady Act as unconstitutionally vague in violation of the Fifth Amendment Due Process Clause because it fails to make explicit, under threat of criminal punishment, the reasonable effort required when determining whether receipt or possession of a handgun would be in violation of the law. A statute is unconstitutionally vague if it threatens sanctions without giving fair warning of the conduct that is proscribed or demanded. *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972). " '[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited.' " *United States v. Dischner*, 974 F.2d 1502, 1510 (9th Cir. 1992) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983), *cert. denied*, 113 S.Ct. 1290 (1993)).

The United States maintains that Sheriff Mack lacks standing to pursue this claim in light of the Office of Legal Counsel's opinion letter proclaiming that the criminal sanctions of the Act were not meant to apply to CLEOs. Because the protection afforded Sheriff Mack by

the opinion letter is illusory,[10] Sheriff Mack is entitled to have the Court decide the merits of this claim. Accordingly, the Court concludes that the mandatory provisions of the statute must fall for vagueness.

The Act requires that Sheriff Mack make a "reasonable effort" to perform a background check within five business days, including research in a national system of records designated by the Attorney General as well as any "available" state and local records. 18 U.S.C. 922(s)(2). Reasonable effort is not defined by statute.

The United States offers one definition to complete the void. It insists that Sheriff Mack is not under a mandatory obligation to determine the legality of handgun transfers. The government's interpretation of the enforcement provisions merely directs the CLEO to determine whether, in light of the resources available in the specific jurisdiction, it would be reasonable to conduct a background check after notice of the proposed sale by a licensed gun seller. The government claims the Act would allow ever changing obligations, as appropriate, in light of individual circumstances. At various times and through various agencies, the government has posited that criminal sanctions do not apply to CLEOs or that criminal sanctions may apply, but only if the CLEO fails to expend "minimal efforts" in pursuit of his or her investigatory duties.

The government's position is untenable. When the language of a criminal statute is clear, as is true of 18 U.S.C. 922(s), the executive branch is not at liberty to

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[10] See supra note 6 and accompanying text.

amend that statute by fiat. Accordingly, the Court finds that Sheriff Mack faces criminal sanctions should he violate the Brady Act's mandatory provisions, but the statutory duty imposed upon him as the CLEO of Graham County is imprecise and indefinite. This runs afoul of the Fifth Amendment Due Process Clause.

Thirteenth Amendment Challenge

Mack next contests the Brady Act on the ground that its enforcement provisions constitute involuntary servitude prohibited by the Thirteenth Amendment. Involuntary servitude in violation of the Thirteenth Amendment "occurs when an individual coerces another into . . . service by improper or wrongful conduct that is intended to cause, and does cause, the other person to believe that he or she has no alternative but to perform the labor." *Brogan v. San Mateo County*, 901 F.2d 762, 764 (9th Cir. 1990) (quoting *United States v. Mussry*, 726 F.2d 1448, 1453 (9th Cir.), *cert. denied*, 469 U.S. 855 (1984)).

In *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court found that a conviction for violating a statute enacted to enforce the Thirteenth Amendment required proof that the alleged victims were "forced to work for the defendant by the use or threat of physical restraint or physical injury" or by law, rather than merely by psychological coercion. *Kozminski*, 487 U.S. at 952. Where as here a person is free to refuse to work without incurring legal sanctions, the Thirteenth Amendment is not violated, even if the choice is a painful one. Mack need only quit his job to be free of the duties imposed upon him by the Act. Under these circumstances, the

Thirteenth Amendment is not implicated. *Id.* at 950 (quoting *United States v. Schackney*, 333 F.2d 475, 487 (2d Cir. 1964))

Severability of Offending Provisions

A statute that is partially unconstitutional may require the Court to invalidate the statute in its entirety. Mack maintains that the unconstitutional provisions of sec. 922(s) are "the heart and foundation of that entire subsection" and the illegality of the part infects the legality of the whole. "Unless it is evident that" Congress would not have enacted the constitutional provisions in a statute independently of any unconstitutional ones, "the invalid part may be dropped if what is left is fully operative as a law." *New York*, 112 S.Ct. at 2434 (citations omitted). Mack interprets both the statutory text and its legislative history to mean that the statute would not have been enacted absent the enforcement duties placed upon the CLEOs. Thus, he claims, the subsections under review are not severable and if even one subsection is unconstitutional the entire act must be rejected.

The Gun Control Act, of which the Brady Act is a part, does in fact contain a severability clause. Section 928 reads: "If any provision of this chapter . . . is held invalid, the remainder of the chapter . . . shall not be affected thereby." 18 U.S.C. 928. If a statute includes a severability clause, there is a presumption that any of its provisions found to be unconstitutional are severable. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). *See Board of Natural Resources v. Brown*, 992 F.2d 937, 948 (9th Cir. 1993) (the absence of a severability clause "does suggest

an intent to have all components operate together or not at all.").

The Supreme Court in *Alaska Airlines* expressed some doubt as to whether the severability clause contained within the Federal Aviation Act of 1958 applied to the Airline Deregulation Act of 1978, the provision under review. *Alaska Airlines*, 480 U.S. at 686 n. 8. As the Supreme Court explained, the Airline Deregulation Act did not truly amend the Federal Aviation Act, but created a whole new program. *Id.* That concern does not apply here. In contrast, the Brady Act does amend the underlying Gun Control Act. Rather than create an entire new program, the Brady Act simply provides a means for implementing the Gun Control Act's prohibition against sales to certain classes of buyers.

Even without applying the severability clause, the offending provision could be separated without doing damage to the entire Brady Act. An invalid provision is severable if the balance of the legislation is capable of functioning independently from the invalid provision, and the statute functions, in the absence of the objectionable provision, "in a manner consistent with the intent of Congress;" *Id.* at 684-85 (emphasis in original).

Accurately gauging the most vulnerable aspect of the Brady Act, the government is hopeful that the Court will limit its redaction to section 922(s)(2), the provision requiring local law enforcement officials to conduct a reasonable background search.[11] This proposal would

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[11] Mack's constitutional challenge encompasses three of the interim provisions of the Act, namely, the requirements that the

leave intact the five-day waiting period, the information and notification duties imposed on gun importers, dealers, and manufacturers, and the option for local officials to conduct a background check.

When considered absent the offending subsection, the statute loses none of its function. The test is whether the elimination "alters the substantive reach of the statute and leaves completely unchanged its basic operation." *Board of Natural Resources*, 992 F.2d at 948 (citations omitted). Irrefutably the balance of the interim provisions can function independent of the alleged invalid provision. Gun sales can be postponed for five days and sworn statements can be forwarded to CLEOs, regardless of whether CLEOs perform any of the three acts described in the challenged provisions.

The Court must next decide whether the offending portion is necessary for the remainder of the Act to function "in a manner consistent with the intent of Congress." The presence of the severability clause is again evidence that Congress intended for the statute to have continued viability, even though partially invalidated.

Mack disagrees, and argues that the bill was a product of a negotiated compromise which Congress would not have adopted but for its many parts. For instance, Mack refers the Court to the destruction requirement, which prevents the inadvertent creation of a registration system, to have been critical to the successful passage of

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CLEO conduct a background check, destroy sworn statements of purchasers after 20 days, and inform rejected purchasers of the reasons for the denial.

the bill. At bottom, Mack has not overcome the presumption in favor of severability and the Court can safely excise the offending provision.

By invalidating the mandatory background check provision, the requirements of the other challenged provisions become optional. For instance, 18 U.S.C. 922(s)(6)(C), which requires the CLEO to provide reasons to the denied purchaser for that determination, becomes elective depending on whether the state chooses to perform background checks. Similarly, 18 U.S.C. 922(s)(6)(B), which orders the CLEO to destroy the sworn statement within 20 days of the date of the transfer again will depend upon the state's voluntary decision to perform the background check. When viewed accordingly, the remaining provisions do not commandeer the states in any way and are therefore constitutional.

ORDER

The Court finds that in enacting section 18 U.S.C. 922(s)(2), Congress exceeded its authority under Article 1, section 8 of the United States Constitution, thereby impermissibly encroaching upon the powers retained by the states pursuant to the Tenth Amendment. The Court further finds that the provision, in conjunction with the criminal sanctions its violation would engender, is unconstitutionally vague under the Fifth Amendment of the United States Constitution.

Accordingly, IT IS HEREBY ORDERED that plaintiff Sheriff Richard Mack's complaint for declaratory and injunctive relief is GRANTED IN PART. The Clerk of the Court is directed to enter a judgment declaring 18 U.S.C.

922(s)(2) to be unconstitutional. IT IS FURTHER ORDERED that defendant United States of America and its agents are PERMANENTLY ENJOINED from further enforcing 18 U.S.C. 922(s)(2).

All other provisions under review are deemed severable from the offending subsection and are found not to violate the United States Constitution.

IT IS FURTHER ORDERED that all pending motions are deemed MOOT by virtue of this order and this case is DISMISSED.

Dated: June 28, 1994

JOHN M. ROLL
United States District Judge

107 STAT. 1536 (Nov. 30, 1993)

PUBLIC LAW 103-159

103d Congress

An Act

To provide for a waiting period before the purchase of a handgun, and for the establishment of a national instant criminal background check system to be contacted by firearms dealers before the transfer of any firearm.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I – BRADY HANDGUN CONTROL

SEC. 101. – SHORT TITLE.

This title may be cited as the "Brady Handgun Violence Prevention Act".

SEC. 102. FEDERAL FIREARMS LICENSEE REQUIRED TO CONDUCT CRIMINAL BACKGROUND CHECK BEFORE TRANSFER OF FIREARM TO NON-LICENSEE.

(a) INTERIM PROVISION. –

(1) IN GENERAL. – Section 922 of title 18, United States Code, is amended by adding at the end the following:

"(s)(1) Beginning on the date that is 90 days after the date of enactment of this subsection and ending on the day before the date that is 60 months after such date of enactment, it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell,

deliver, or transfer a handgun to an individual who is not licensed under section 923, unless –

"(A) after the most recent proposal of such transfer by the transferee –

"(i) the transferor has –

"(I) received from the transferee a statement of the transferee containing the information described in paragraph (3);

"(II) verified the identity of the transferee by examining the identification document presented;

"(III) within 1 day after the transferee furnishes the statement, provided notice of the contents of the statement to the chief law enforcement officer of the place of residence of the transferee; and

"(IV) within 1 day after the transferee furnishes the statement, transmitted a copy of the statement to the chief law enforcement officer of the place of residence of the transferee; and

"(ii)(I) 5 business days (meaning days on which State offices are open) have elapsed from the date the transferor furnished notice of the contents of the statement to the chief law enforcement officer, during which period the transferor has not received information from the chief law enforcement officer that receipt or possession of the handgun by the transferee would be in violation of Federal, State, or local law; or

"(II) the transferor has received notice from the chief law enforcement officer that the officer has no information indicating that receipt or

possession of the handgun by the transferee would violate Federal, State, or local law;

"(B) the transferee has presented to the transferor a written statement, issued by the chief law enforcement officer of the place of residence of the transferee during the 10-day period ending on the date of the most recent proposal of such transfer by the transferee, stating that the transferee requires access to a handgun because of a threat to the life of the transferee or of any member of the household of the transferee;

"(C)(i) the transferee has presented to the transferor a permit that –

"(I) allows the transferee to possess or acquire a handgun; and

"(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

"(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of the law;

"(D) the law of the State requires that, before any licensed importer, licensed manufacturer, or licensed dealer completes the transfer of a handgun to an individual who is not licensed under section 923, an authorized government official verify that the information available to such official does not indicate that possession of a handgun by the transferee would be in violation of law;

"(E) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

"(F) on application of the transferor, the Secretary has certified that compliance with subparagraph (A)(i)(III) is impracticable because –

"(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

"(ii) the business premises of the transferor at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer; and

"(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

"(2) A chief law enforcement officer to whom a transferor has provided notice pursuant to paragraph (1)(A)(i)(III) shall make a reasonable effort to ascertain within 5 business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

"(3) The statement referred to in paragraph (1)(A)(i)(I) shall contain only –

"(A) the name, address, and date of birth appearing on a valid identification document (as defined in section 1028(d)(1)) of the transferee containing a photograph of the transferee and a description of the identification used;

"(B) a statement that the transferee –

"(i) is not under indictment for, and has not been convicted in any court of, a crime punishable by imprisonment for a term exceeding 1 year;

"(ii) is not a fugitive from justice;

"(iii) is not an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act);

"(iv) has not been adjudicated as a mental defective or been committed to a mental institution;

"(v) is not an alien who is illegally or unlawfully in the United States;

"(vi) has not been discharged from the Armed Forces under dishonorable conditions; and

"(vii) is not a person who, having been a citizen of the United States, has renounced such citizenship;

"(C) the date the statement is made; and

"(D) notice that the transferee intends to obtain a handgun from the transferor.

"(4) Any transferor of a handgun who, after such transfer, receives a report from a chief law enforcement officer containing information that receipt or possession of the handgun by the transferee violates Federal, State, or local law shall, within 1 business day after receipt of such request, communicate any information related to the transfer that the transferor has about the transfer and the transferee to –

"(A) the chief law enforcement officer of the place of business of the transferor; and

"(B) the chief law enforcement officer of the place of residence of the transferee.

"(5) Any transferor who receives information, not otherwise available to the public, in a report under this subsection shall not disclose such information except to the transferee, to law enforcement authorities, or pursuant to the direction of a court of law.

"(6)(A) Any transferor who sells, delivers, or otherwise transfers a handgun to a transferee shall retain the copy of the statement of the transferee with respect to the handgun transaction, and shall retain evidence that the transferor has complied with subclauses (III) and (IV) of paragraph (1)(A)(i) with respect to the statement.

"(B) Unless the chief law enforcement officer to whom a statement is transmitted under paragraph (1)(A)(i)(IV) determines that a transaction would violate Federal, State, or local law –

"(i) the officer shall, within 20 business days after the date the transferee made the statement on the basis of which the notice was provided, destroy the statement, any record containing information derived from the statement, and any record created as a result of the notice required by paragraph (1)(A)(I)(III)

"(ii) the information contained in the statement shall not be conveyed to any person except a person who has a need to know in order to carry out this subsection; and

"(iii) the information contained in the statement shall not be used for any purpose other than to carry out this subsection.

"(C) If a chief law enforcement officer determines that an individual is ineligible to receive a handgun and the individual requests the officer to provide the reason for such determination, the officer shall provide such reasons to the individual in writing within 20 business days after receipt of the request.

"(7) A chief law enforcement officer or other person responsible for providing criminal history background information pursuant to this subsection shall not be liable in an action at law for damages –

"(A) for failure to prevent the sale or transfer of a handgun to a person whose receipt or possession of the handgun is unlawful under this section; or

"(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a handgun.

"(8) For purposes of this subsection, the term 'chief law enforcement officer' means the chief of police, the sheriff, or an equivalent officer or the designee of any such individual.

"(9) The Secretary shall take necessary actions to ensure that the provisions of this subsection are published and disseminated to licensed dealers, law enforcement officials, and the public.".

(2) HANDGUN DEFINED. – Section 921(a) of title 18, United States Code, is amended by adding at the end the following:

"(29) The term 'handgun' means –

"(A) a firearm which has a short stock and is designed to be held and fired by the use of a single hand; and

"(B) any combination of parts from which a firearm described in subparagraph (A) can be assembled.".

(b) PERMANENT PROVISION. – Section 922 of title 18, United States Code, as amended by subsection (a)(1), is amended by adding at the end the following:

"(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless –

"(A) before the completion of the transfer, the licensee contacts the national instant criminal background check system established under section 103 of that Act;

"(B)(i) the system provides the licensee with a unique identification number; or

"(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section; and

"(C) the transferor has verified the identity of the transferee by examining a valid identification document

(as defined in section 1028(d)(1) of this title) of the transferee containing a photograph of the transferee.

"(2) If receipt of a firearm would not violate section 922 (g) or (n) or State law, the system shall –

"(A) assign a unique identification number to the transfer;

"(B) provide the licensee with the number; and

"(C) destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer.

"(3) Paragraph (1) shall not apply to a firearm transfer between a licensee and another person if –

"(A)(i) such other person has presented to the licensee a permit that –

"(I) allows such other person to possess or acquire a firearm; and

"(II) was issued not more than 5 years earlier by the State in which the transfer is to take place; and

"(ii) the law of the State provides that such a permit is to be issued only after an authorized government official has verified that the information available to such official does not indicate that possession of a firearm by such other person would be in violation of law;

"(B) the Secretary has approved the transfer under section 5812 of the Internal Revenue Code of 1986; or

"(C) on application of the transferor, the Secretary has certified that compliance with paragraph (1)(A) is impracticable because –

"(i) the ratio of the number of law enforcement officers of the State in which the transfer is to occur to the number of square miles of land area of the State does not exceed 0.0025;

"(ii) the business premises of the licensee at which the transfer is to occur are extremely remote in relation to the chief law enforcement officer (as defined in subsection (s)(8)); and

"(iii) there is an absence of telecommunications facilities in the geographical area in which the business premises are located.

"(4) If the national instant criminal background check system notifies the licensee that the information available to the system does not demonstrate that the receipt of a firearm by such other person would violate subsection (g) or (n) or State law, and the licensee transfers a firearm to such other person, the licensee shall include in the record of the transfer the unique identification number provided by the system with respect to the transfer.

"(5) If the licensee knowingly transfers a firearm to such other person and knowingly fails to comply with paragraph (1) of this subsection with respect to the transfer and, at the time such other person most recently proposed the transfer, the national instant criminal background check system was operating and information was available to the system demonstrating that receipt of a firearm by such other person would violate subsection (g) or (n) of this section or State law, the Secretary may, after notice and

opportunity for a hearing, suspend for not more than 6 months or revoke any license issued to the licensee under section 923, and may impose on the licensee a civil fine of not more than $5,000.

"(6) Neither a local government nor an employee of the Federal Government or of any State or local government, responsible for providing information to the national instant criminal background check system shall be liable in an action at law for damages -

"(A) for failure to prevent the sale or transfer of a firearm to a person whose receipt or possession of the firearm is unlawful under this section; or

"(B) for preventing such a sale or transfer to a person who may lawfully receive or possess a firearm.".

(c) PENALTY. - Section 924(a) of title 18, United States Code, is amended -

(1) in paragraph (1), by striking "paragraph (2) or (3) of"; and

(2) by adding at the end the following:

"(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined not more than $1,000, imprisoned for not more than 1 year, or both.".

. . . .

SEC. 104. REMEDY FOR ERRONEOUS DENIAL OF FIREARM.

(a) IN GENERAL. – Chapter 44 of title 18, United States Code, is amended by inserting after section 925 the following new section:

"§ 925A. Remedy for erroneous denial of firearm

"Any person denied a firearm pursuant to subsection (s) or (t) of section 922 –

"(1) due to the provision of erroneous information relating to the person by any State or political subdivision thereof, or by the national instant criminal background check system established under section 103 of the Brady Handgun Violence Prevention Act; or

"(2) who was not prohibited from receipt of a firearm pursuant to subsection (g) or (n) of section 922, may bring an action against the State or political subdivision responsible for providing the erroneous information, or responsible for denying the transfer, or against the United States, as the case may be, for an order directing that the erroneous information be corrected or that the transfer be approved, as the case may be. In any action under this section, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.".

. . . .

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Sheriff Richard Mack

v. No. 94-113-TUC-JMR

United States of America

Plaintiff Sheriff Richard Mack declares and states:

1. I am sheriff of, and reside in, Graham County, Arizona, having been elected by the citizens of that county in 1988 and since re-elected.

2. The office of sheriff is created by Article 12, § 3 of the Constitution of Arizona; its duties are fixed by Arizona Revised Statutes, Title 11; its budget allocations are fixed by the County Board of Supervisors.

. . . .

9. I have in my office an undersheriff, one detective, a patrol sergeant, and nine deputies for active patrol. These must provide 24 hour law enforcement for 4,500 square miles under my jurisdiction, occupied by 28,000 persons. By my calculation, we average 1.5 deputies on patrol at any given moment, for this entire area. Between the necessity of responding to actual calls, these are hard put to provide routine patrol. Until recently, I performed our Drug Abuse Resistance Education duties myself, simply so that we would not have to take a deputy off patrol to carry it out. If I am now compelled to perform background checks of our residents, it will have to be done by pulling deputies off patrol. For a large department, removing one deputy from patrol may not be a burden.

For the 28,000 residents of Graham County it means an 11% reduction in law enforcement protection.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Sheriff Richard Mack

v. No. 94-113-TUC-JMR

United States of America

Reporter's Transcript of Proceedings
Before the Honorable John M. Roll
May 31, 1994

[Testimony of Sheriff Richard Mack]

[p. 7] Q. Based on your three months' experience with the Act, how much time would you say, man-hours wise, you are putting in on it?

A. Probably for all personnel that have participated, it is an average of an hour or two a day.

Q. How many 'hits' have you had in the last three months?

A. Out of all the checks that we have done, which have numbered over 80, there was one that was questionable, and we denied a handgun purchase to that individual.

Q. Did he agree with your finding that it was questionable?

A. No, he was quite upset. He did not agree with it. He said that his civil rights have been restored. The conviction that it shows on his rap sheet was from another state, so I wasn't able to verify it then. I told him he would have to show me verification of that.

. . . .

[p. 8] Q. Have you received criticism from persons regarding your performance of the checks?

A. Yes, they believe that it was a waste of time, and that the Sheriff's Office should be spending County taxpayer dollars on more pressing matters.